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(1)

Supreme Court, U.S.
FILED

08-373 SEP 19 2008

OFFICE OF THE CLERK
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No. 08-

In The

Supreme Court of the United States

STEVEN SMITH,
Petitioner,

v.

CONSOLIDATED FREIGHTWAYS, INC.,
Respondent.

On Petition for *Writ of Certiorari* to the
Pennsylvania Supreme Court

Petition for Writ of Certiorari

Mary Ellen Chajkowski, Esquire
Counsel of record for Petitioner
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QUESTIONS PRESENTED

I.

Whether it was an error to dismiss Petitioner's workers' compensation claims as untimely?

II.

Whether failure to grant Petitioner a hearing constituted a 14th Amendment Violation?

III.

Whether adjudication without a hearing to admit evidence and properly adduce facts is in accord with Petitioner's statutory rights under the controlling state and federal law?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to R. 14.1, the following list identifies all parties appearing here and in the court below.

Petitioner here and in state courts is Steven Smith, a commercially licensed driver poisoned in the course of employment by hazardous material, shipped inbound from Michigan in a damaged container and outbound from Pennsylvania by Respondent

The self-insured common/carrier Respondent here and in Pennsylvania courts is Petitioner's employer for thirty-years, Consolidated Freightways, Inc., a Delaware corporation headquartered in California.

Con-way, Inc. asserted, in its 2006 civil action against Petitioner, that its corporate successor interest to Consolidated is on record with the PA Department of Labor.

Pursuant to Rule 29.6, Petitioner states that Petitioner is not a corporation.

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Mr. Steven Smith respectfully petitions for a *writ of certiorari* to review the judgment of the Pennsylvania Supreme Court in this case.

OPINION BELOW

The Pennsylvania Supreme Court order *per curiam* at 78 WM 2007 is attached to this petition as Appendix A.

The Workers Compensation Appeal Board Order - A07-0371 is attached as Appendix B.

JURISDICTION

The Pennsylvania Supreme Court entered its decision and order on June 25, 2008.

A Petition for Reconsideration filed July 8, 2008 was withdrawn September 19, 2008, upon filing this Petition for *Writ of Certiorari.*

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254, Mr. Smith asserted below and asserts in this petition the deprivation of rights secured by the Constitution.

CONSTUTIONAL PROVISIONS

This case involves the U.S. Const. Amend. XIV, section 1 "....nor shall any State deprive any person of life, liberty, or property, without due process of law.

The Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such Regulations as the Congress shall make. U.S.C.A. Const. Art. III s2, cl.2

STATEMENT OF THE CASE

Respondent reported Petitioner's February 28,1996 hazardous "exposure" to departments of Labor and Transportation.

Petitioner's workers' compensation report stated he suffered nausea, lightheadedness and a bitter taste in his mouth from inhaling a leaking shipment of poison on the truck.

Respondent reported to DOL Petitioner's symptoms from breathing 6.1 PG III fumes.

Respondent reported to DOT that the shipment was damaged in transit, contrary to its manifest; it was damaged inbound.

Respondent's terminal manager reported Petitioner was "exposed" to damaged and leaking boxes loaded by untrained workers.

OSHA investigated, cited and fined Respondent employer but an April 12, 1996 a settlement was entered to abate fines.

The same date self-insured Respondent employer settled with OSHA, it sent Petitioner to its medical panel providers who refused to release Petitioner to return to work.

Respondent refused to pay medical bills it generated sending him to its panel provider.

May 6, 1996, self-insured Respondent filed untimely Notice of Denial in *bad faith*, aware administrative courts have limited jurisdiction and no training on hazardous transport.

Respondent contested Petitioner's claims by denying facts set forth in Chemrex MSDS.

Petitioner first learned that Respondent entered a settlement with OSHA at the administrative hearing, where Respondent

contested "causation" and stated to the court that its shipment was NOT poison and NOT damaged [Hrg. Transcript, pp. 60-61], assertions contrary to its OSHA settlement, its shipping documents, its reports to DOT and DOL, and Chemrex MSDS in its possession.

Self-insured Respondent submitted a false expert chemical report, which stated there was no available literature on the chemical.

It was a material omission for self-insured Respondent to withhold Chemrex MSDS from its expert, from Petitioner and his medical providers, and from the Pennsylvania courts.

Self-insured Respondent constructively discharged its thirty-year employee when it refused to return Petitioner to work, age 59.

The WCAB consolidated Petitioner's first appeals and entered a dismissal order on December 31, 1999, not 1997 as stated in the last paragraph of Appendix B, a 2007 WCAB order under consideration before this court.

Petitioner requested his "exposure" records, which OSHA released to him in 2001. Petitioner exercised due diligence and made a timely request within twenty-one months of the 1999 WCAB decision for a hearing to admit Chemrex MSDS evidence wrongfully withheld from him in 1996, which the Pennsylvania courts inequitably denied.

Petitioner filed a penalty petition for a hearing to prove allegations Respondent perpetrated a fraud on the court through perjury, as Chemrex MSDS contradicts every document Respondent submitted *ab initio*. Shipping docs are *prima facie* evidence.

REASON WRIT SHOULD BE GRANTED

The Hazardous Communication Statute, 29 CFR 1910.12, *et seq.*, is a neutral federal law to protect the public. Every individual who 'ruled on' or 'contested' the Petitioner's claims and appeals in the state court system is entitled to statutory chemical disclosure, 29 CFR 1910.1200(i)(3)(ii)(A) and payment for medical treatment Id at 1910.1200(i)(3)(ii)(D). It was a violation of the 14th Amendment for Pennsylvania courts to deny request for a hearing on Respondent obstructive conduct That inequitable state action occasioned an unconstitutional taking of Petitioner property.

I. PREJUDICIAL ERROR OF LAW

The Workers' Compensation Act is remedial legislation and, thus, is subject to liberal construction to effectuate the Act's purpose of benefiting injured workers and their dependents. 77 P.S. §1, *et seq.*

Petitioner filed successive claims and appeals to admit evidence that Respondent perpetrated a fraud and the Pennsylvania courts denied Petitioner any hearing.

Respondent paid Petitioner no benefits *ab initio* and asserted affirmative defenses in response to allegations of fraud and perjury.

Petitioner is entitled to due process and an order supported by substantial evidence.

The Pennsylvania Supreme Court doctrine of equitable *estoppel* must be applied here:

> "Equitable *estoppel* arises in the workers' compensation arena when an employer, by its acts, representations, or admissions, or by its silence when it ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. Westinghouse Elec. Corp./CBS v. WCAB (Korach), 833 A.2d 579 (Pa. 2005).

The Chemrex MSDS contradicts every document submitted by Respondent in a *bad faith* contest of Petitioner's claim.

Failure to hold a hearing to admit new evidence on allegations of Respondent's fraud occasioned prejudicial legal error.

Under the statute of repose, Petitioner had 500-weeks to establish employer liability. Therefore, Petitioner filed timely petitions for a hearing to admit evidence his self-insured employer perpetrated a fraud on the court.

> "Section 413(a) contains a three-year statute of limitations for filing petitions to review, modify, reinstate compensation. *See* Smith v. WCAB, 543 Pa. 295, 670 A.2d 1146 (1006). Section 413(a) also imposes a statute of repose whereby a petition for reinstatement of suspended benefits must be filed within 500 weeks of suspension of compensation. Lopresti v. WCAB (Taylor Wharton Co.), 692 A.2d 629 (Pa. Cmwlth),

appeal denied, 549 Pa. 720, 701 A.2d 580 (1997). This Court has held that the 500-week period is calculated from effective date of the suspension rather than the date of order suspending compensation. Roussos v. WCAB (St. Vincent Health Center), 157 Pa. Cmwlth. 584, 630 A.2d 555 (1993)."

The difference in calculating the two time periods becomes understandable when one considers the fundamental difference between the two types of limitation periods. A statute of limitations extinguishes the availability of a remedy, whereas statute of repose extinguishes the underlying right. Smith; Black's Law Dictionary 927 (6th ed. 1990). Thus the calculation of the 500-week statute of repose hinges closely upon the status of the claimant's right to compensation, while the calculation of the three-year statute of limitations hinges upon the claimant's need for a remedy." Flanigan v. WCAB (Colt Industries), 726 A.2d 424 (Pa. Cmwlth. 1999).

Petitioner was never given a chance to admit Chemrex MSDS in order to establish Respondent liability and to prove a causal relationship between his mucous membrane damage or irregular heart-beat and his hazardous "exposure". In Flanigan, the PA Commonwealth Court vacated a WCAB Order where claimant was denied any

opportunity to present evidence in the reinstatement proceedings. The appellate court stated that claimant was entitled to prove that her condition has changed and that she has suffered a recurrence of her work-related disability. Id.

Petitioner was entitled to Chemrex MSDS for medical treatment and causation proof. Respondent breached its statutory duty under federal Hazardous Communication Statutes, 29 CFR 1910.1200, *et seq.* and the Pennsylvania Right to Know Act, neutral laws intended to protect the public.

II. INEQUITABLE APPLICATION OF LAW

Petitioner was inequitably denied a hearing to admit evidence while a similarly situated claimant was granted a hearing to admit evidence. In Flanagan, when the record reflected that neither the WCJ nor the Board received any evidence in the reinstatement proceedings, an appeal followed; the orders were vacated by the appellate court and remanded. Flannigan v. W.C.A.B. (Colt Industries), 726 A.2d 424 (Pa.Cmwlth.,1999).

The 1978 claimant in Romanowski was permitted to admit evidence to support a petition filed in 2004 on the 1978 personal injury claim. Claimant returned to work in January 1993 with an agreement. The 500-week period following the suspension of Claimant's benefits ended in July 2002.

> "In October 2004, Claimant filed a reinstatement petition alleging a worsened condition, decreased earning power and a specific loss of his right foot. Employer filed a timely answer denying Claimant's allegations. At an October 2005 hearing, Claimant withdrew his reinstatement claims and proceeded solely with his specific loss claim. A Workers' Compensation Judge (WCJ) held a series of hearings on the specific loss claim, and both parties submitted medical evidence." Romanowski v. W.C.A.B.(Prec. Coil Proc.) 944 A.2d 127(Pa.Cmwlth., 2008).

Petitioner was not afforded due process that courts afforded Romanowski claimant. No substantial evidence supports dismissal.

The lower courts adopted the wrong presumptions regarding burden of proof. Petitioner offered evidence that he was in good health prior to the accident, as the self-insured Respondent knew from its mandatory CDL physical examinations.

> "To meet the burden in the present case, it was proved that Smith had been in good health prior to the accident, and that injury resulted therefrom, making necessary immediate medical attention, which was continued regularly until the time of his death. No other intervening

cause appeared, a matter which is to be considered. Blasband v. P.R.T. Co., 42 Pa. Super. Ct. 325. The doctor who was in charge of the patient... testified positively that, from his observation of the case, he believed the cancer, as a result of which death ensued, arose from the injury." Smith v. Primrose Tapestry Co. 285 Pa. 145, 131 A. 703 (Pa. 1926).

Respondent must be *estopped* from continuing violation of the Pennsylvania Right to Know, as Sec. 16 expressly states: "Any person who knowingly makes a false statement or representation in any list, record or other document required to be maintained pursuant to this actor who intentionally or deliberately refrains from complying with this act shall be assessed a civil penalty of not more than $10,000, or shall be guilty of a criminal offense classed as a misdemeanor of the first degree, or both." Pa. Rt. To Know Act 1984-159.

Sec 19 – Construction of the Act; (a) No release from liability states: "Nothing in this act shall in any way relieve an employer or supplier from liability with regard to the health and safety of an employee or other persons exposed to any substances, nor shall it relieve an employer or supplier from any other duty or responsibility under any other provision of law." Act 1984-159, Id.

Petitioner's statutory right to hazardous chemical information and treatment is federally regulated to displace conflicts in state law. R.F. v. Abbott Labs, 162 N.J. at 619. Therefore, the Pennsylvania courts must not permit Respondent's obstructive conduct to interfere with the statutory rights of Petitioner.

III. ORDER NOT IN ACCORD WITH LAW

The state courts interfered with Petitioner's statutory and constitutional due process and his right to an order supported by evidence. Without a hearing to admit MSDS evidence, all decisions adverse to Petitioner rest on Respondent's report on the wrong chemical, by an expert who never spoke to and never examined Petitioner. Respondent's expert stated there is no available literature on the chemical, roundly contradicted by MSDS.

> The Pennsylvania Supreme Court's decision in Leon E. Wintermyer, Inc., v. WCAB (Marlowe), 571 Pa. 189, 812 A.2d 478 (2002), held that "Since an adjudication cannot be in accordance with law if it is not decided on the basis of law and facts properly adduced, review for capricious disregard of material, competent evidence is an appropriate component of appellate consideration in every case in which such question is properly brought before the court." Id.

Budd Baer, Inc. v. W.C.A.B. (Butcher)
892 A.2d 64 (Pa.Cmwlth. 2006).

The lower courts never addressed Petitioner claims that Respondent failed to enforce the settlement agreement with OSHA, by coming into compliance with the federal Hazardous Communication statute, 29 CFR 1910.1200, *et seq.* and Pennsylvania Right to Know Law, which entitled Petitioner to exact chemical information, Chemrex MSDS and payment for medical treatment.

Respondent failure to acknowledge its liability occasioned economic losses to Petitioner, his family, his health and welfare fund and the Veterans Administration, in order to pay for his medical treatment.

Petitioner was forced to take retirement one year early, at a monthly loss of one thousand dollars pension income.

Petitioner lost a five-year pension from the state of Illinois due to inequitable treatment.

Petitioner lost a $5,000.00 (five thousand dollar) insurance policy due to the courts' failure to grant him a hearing on the merits.

Many workers today have no health and welfare fund to supplant the loss of medical and wage benefits. Therefore, this case presents an opportunity for this honorable court to address issues of important public policy, as inequitable state action may effect unconstitutional *taking* of property from one party or enrich one party unjustly. The integrity of the courts is at issue here.

The purpose of time limits remain constant:

> 'The time limit in which claims might be filed was placed in the act not only to produce a uniform practice, but to enable employers to know the period of time they could be called upon to respond for just claims, so that they might not be constantly expecting stale claims of doubtful merit.' Smith v. Primrose Tapestry, 285 Pa. 145, 131 A. 703, Pa. 1926

Respondent was fully aware of Petitioner claims and breached a statutory duty when it withheld MSDS from Petitioner, his medical providers and the courts. Petitioner would have prevailed on the merits in 1996 if he had Chemrex MSDS to admit as evidence.

Respondent's obstructive conduct interfered with uniformity and due process, which must not be time-barred by courts.

CONCLUSION

This petition for *Writ of Certiorari* should be granted in the interest of uniformity, statutory compliance and public policy.

Respectfully submitted,

/s/ Mary Ellen Chajkowski, Esquire
Counsel of record for Petitioner
September 19, 2008

APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

STEVEN SMITH,
Petitioner,

v.

No. 78 WM 2007

Application for
Extraordinary Relief

WORKERS COMPENSATION
APPEAL BOARD
(Consolidated Freightways, Inc.)

ORDER

PER CURIAM

AND NOW, this 25th day of June 2008, the Application for Extraordinary Relief and the Application for Permission to Reply are hereby DENIED.

A True Copy Patricia Nicola
As of. June 25, 2008
Attest: /s/Patricia Nicola
Chief Clerk
Supreme Court of Pennsylvania

APPENDIX B

OPINION A07-0371

Frioni, Commissioner:

Before the Workers' Compensation Appeal Board is the Appeal of Steven Smith (Claimant) from the Decision and Order of Workers' Compensation Judge (WCJ) Persifor Oliver granting the motion of Consolidated Freightways (Defendant) to dismiss Claimant's Petition for Workers' Compensation Benefits (Claim Petition). We affirm.

On May 15, 1996, Claimant filed his first Claim Petition alleging that on February 28, 1996, he was exposed to the chemical trichloroethane in the course of his duties as a truck driver, and that he was disabled as a result of that exposure. WCJ Kathleen Vallely, in a Decision and Order circulated October 16, 1997 determined that Claimant failed to meet his burden of proving the causal relationship between this exposure and any disability by unequivocal medical evidence. She accepted the fact of the exposure, but found that no injury or disability resulted. WCJ Vallely's Decision was appealed to this Board and was affirmed.

On September 27, 2001, Claimant filed a second Claim Petition alleging a work-related chemical exposure on February 28,

1996, and resultant disability. He argued that he should not be precluded from filing a second petition because Defendant fraudulently withheld Material Data Safety Sheets for the chemicals to which Claimant had been exposed. WCJ Henry dismissed the second Claim Petition on the basis of *res judicata* and *collateral estoppel*, reasoning that the lack of the MSDS was immaterial to the disposition of the previous claim petition. Claimant unsuccessfully appealed or attempted to appeal WCJ Henry's Decision to this Board, the Commonwealth Court, the Pennsylvania Supreme Court, and ultimately the United States Supreme Court.

On September 30, 2004, Claimant filed his third claim petition alleging the same injury on the same date. WCJ Parker dismissed the third claim petition concluding that she lacked jurisdiction over the third petition because Claimant's second petition was on appeal to the Pennsylvania Supreme Court.

On October 25, 2005, Claimant filed a Petition for Penalties (Penalty Petition) alleging that Defendant violated the Worker Compensation Act[1] by failing to pay his medical expenses and indemnity benefits, again referable to an alleged injury of February 28, 1996. WCJ Oliver dismissed the Penalty Petition because claimant failed to identify a violation on the record. Claimant appealed that dismissal to this Board, and

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[1] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§1-1041.4; 2501-2626.

we affirmed WCJ Oliver's Decision. Claimant's appeal from that Order was dismissed by the Commonwealth Court on May 17, 2007. A Petition for Allowance of Appeal is pending before the Pennsylvania Supreme Court.

On July 19, 2006, Claimant filed a fourth Claim Petition alleging chemical exposure on Feburary 28, 1996 and seeking full disability benefits. Defendant filed an Answer to the Petition and a Motion to Dismiss. WCJ Torrey dismissed the fourth Claim Petition as untimely filed, and on the basis of *res judicata*. By Opinion issued May 21, 2007, we affirmed WCJ Torrey's dismissal on the basis of the statute of limitations and did not reach the second basis for denial.

On November 20, 2006, Claimant filed the present Petition, again alleging disability as a result of chemical exposure on February 28, 1996, in the course of his employment by Defendant. Defendant filed an Answer to the Petition, along with a Motion to Dismiss. Claimant additionally filed a motion for judgment on the pleadings, requesting an award of benefits to Claimant or, in the alternative, that Defendant's Motion to Dismiss be denied and a hearing on the merits scheduled. WCJ Oliver dismissed the Petition on the basis of *res judicata*, *collateral estoppel*, and the statute of limitations. Claimant appeals.

The Board's scope of review on appeal is limited to determining whether the necessary findings of fact are supported by

substantial, competent evidence or whether an error of law was committed. Bethenergy Mines v. WCAB (Skirpan), 612 A.2d 434, (Pa. 1992). If the record contains evidence which a reasonable person might find sufficient to support the WCJ's findings of fact, the findings must be affiremed. Id.

Claimant argues that the WCJ erred as a matter of law by dismissing the Claim Petition as time-barred, maintaining that obstructive conduct by Defendant tolls the statute of limitations. We disagree.

Section 315 of the Act provides in pertinent part:

In cases of personal injury all claims for compensation shall be forever barred, unless, within three years after the injury, the parties shall have agreed upon the compensation payable under this article; or unless within three years after the injury, one of the parties shall have filed a petition as provided in article four hereof. 77 P.S. §602. The running of the three-year limitation period begins on the date of the injury. McDevitt v. WCAB (Ron Davidson Chevrolet) 525 A.2d 1252 (Pa. Cmwlth. 1987), appeal denied, 552 A.2d 1048 (Pa. 1989).

We determine no error in WCJ Oliver's dismissal of Claimant's Petition as time-barred. The petition alleges a single date of exposure of February 28, 1996, more than three years before the date of filing of this most recent Claim Petition. Moreover, even if the statute of limitations was tolled until Claimant procured an MSDS in 2001, the

filing of this Petition on November 20, 2006 is outside the three-year statute of limitations and is untimely.

Claimant further argues that because his original Claim Petition in 1996 was filed timely, his subsequent claims cannot be time-barred. We disagree.

Petitioner's 1996 Claim Petition was denied because WCJ Vallely determined that Claimant did not meet his burden of proving a causal connection between the work injury complained of and any subsequent loss of earnings. WCJ Vallely accepted as credible medical evidence that any impairment suffered by Claimant was a non-work related condition. This Board affirmed that determination in 1997. No appeal was taken from the Board's decision. Therefore, the litigation of the claim petition ended. Claimant advances no good authority for his contention that subsequent petitions seeking to re-litigate the same facts and circumstances relate back to the filing date of his first petition. We determine no error.[2]

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[2] Because we determine that the present Claim Petition is time-barred, we do not reach Claimant's contention that the WCJ has no authority to dismiss a claim petition without a hearing. Nonetheless, we agree with the WCJ that a full evidentiary hearing is not required in every case, and determine that the WCJ did not abuse his discretion by dismissing the present claim. Karotka v. WCAB (Millcreek Community Hosp.), 840 A.2d 1040 (Pa. Cmwlth. 2003), appeal denied, 835 A.2d 710 (Pa. 2003). We also do not have to address whether Claimant's petition is

We enter the following:

ORDER

The Decision and Order of the Workers' Compensation Judge is hereby AFFIRMED.

BY THE BOARD:
/s/ Alfonse Frioni
Commissioner

CONCURRED IN BY:

/s/ Seven Additional Commissioners

September 18, 2007

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barred by *res judicata* or *collateral estoppel*, but observe that the WCJ's decision makes a compelling case for dismissal on those grounds as well.

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(2)

No. 08-373

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In The

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Steven Smith,
Petitioner

v.

Consolidated Freightways, Inc.,
Respondent

On Petition for *Writ of Certiorari*
to the Supreme Court of the United States

Brief in Opposition to *Writ of Certiorari*

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QUESTIONS PRESENTED

I. Whether it was an error to dismiss Petitioner's workers' compensation claims as untimely?

II. Whether failure to grant Petitioner a hearing constituted a 14th Amendment violation?

III. Whether adjudication without a hearing to admit evidence and properly adduce facts is in accord with Petitioner's statutory rights under the controlling state and federal law?

PARTIES

STEVEN SMITH, a Claimant in a Pennsylvania Workers' Compensation claim.

Respondent named is **CONSOLIDATED FREIGHTWAYS, INC.,** Mr. Smith's Employer at the time of the alleged work injury who was self-insured under Pennsylvania law at that time and whose interest has devolved upon Conway, Inc., a successor in interest with regard to workers' compensation cases within the timeframe encompassed by the one brought by Mr. Smith.

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COUNTERSTATEMENT OF THE CASE

This matter began its long litigation history as a claim petition filed by Petitioner here, Steven Smith (hereinafter "Claimant") against his then Employer, Consolidated Freightways for workers' compensation benefits resulting from the alleged exposure to a chemical on or about February 28, 1996. That claim was litigated to conclusion before Pennsylvania Workers' Compensation Judge Kathleen Vallely. Judge Vallely issued a Decision under date of October 16, 1997 in which she found that Claimant had, in fact, been exposed to trichloroethane in the course and scope of his employment but that he had suffered no injury as a result thereof. Claimant filed a subsequent Petition claiming entitlement to reimbursement for medical expenses as a result of the exposure to the chemical referenced above. That Petition was similarly denied by Judge Vallely under date of November 30, 1998, in which Decision she found that while Claimant had been exposed, he incurred no medical expenses reasonable and necessary for the treatment of any condition related to that exposure.

Both of those Decisions by Judge Vallely (the original dismissal of the Claim Petition and the Denial of the Review Medical Petition), were appealed to the Workers' Compensation Appeal Board, Pennsylvania's first level appellate process for workers' compensation cases. The Appeal Board, in a Decision dated December 31, 1999, affirmed both Decisions of Judge Vallely. No further appellate action was taken by Claimant at that time.

Claimant filed a second Claim Petition on or about September 24, 2001 for the same alleged exposure. That Claim Petition was dismissed by Workers' Compensation Judge David Henry under date of March 26, 2002, finding not only was the claim barred by the doctrine of *res judicata*, but that the various charges of misconduct Claimant leveled against the Defendant were not relevant in the matter inasmuch as they went to the exposure that Judge Vallely had

found and did not in any way address either disability or entitlement to medical expenses. That Decision was affirmed by the Workers' Compensation Appeal Board under date of July 29, 2003. In turn, that Workers' Compensation Appeal Board Decision was affirmed by a Memorandum Opinion of our Commonwealth Court dated December 17, 2003 that held not only was the new Petition barred by the doctrine of *res judicata*, but the various materials alleged by Claimant to have been after discovered evidence or related to the conduct of Defendant provided absolutely no basis for the reopening of the underlying Decision and, even if they had, such reopening was barred by the time limits applicable to the reconsideration section of the Pennsylvania Workers' Compensation Act (Section 426), 77 P.S. § 871. The Pennsylvania Supreme Court denied a Petition for Allowance of Appeal filed by Claimant with regard to that Decision by the Commonwealth Court. Claimant then sought review by this Honorable Court with the filing of a Petition for Certiorari which was, along with its subsequent request for rehearing, denied by this Court by Final Order dated November 14, 2005.

During the pendency of that appeal process, Claimant had filed a third Claim Petition for the same alleged exposure on the same alleged date, on or about September 23, 2004. That Decision was dismissed by Workers' Compensation Judge Rosalie Parker. The subsequent appeal to the Workers' Compensation Appeal Board produced an affirmation of that Decision by Order dated March 31, 2006. The Appeal Board's Decision was affirmed by Order of the Commonwealth Court of Pennsylvania (again in a Memorandum Opinion) under date of November 15, 2006. Cross-Petitions for Allowance of Appeal (Defendant sought review of the denial of their request for attorney fees against Claimant's counsel under the Pennsylvania Rules of Appellate Procedure) were denied.

In the meantime, however, Claimant had filed yet another Petition on this matter in the nature of a Penalty

Petition. That Petition was dismissed by Workers' Compensation Judge Persifor Oliver (after Motion, Rule and hearing on the Rule) under date of December 19, 2005, in which he held that since there had never been an award of benefits or agreement for benefits, no penalties could possibly be awarded under the Pennsylvania Workers' Compensation Act. Claimant appealed that Decision to the Pennsylvania Workers' Compensation Appeal Board who affirmed. Claimant attempted to appeal to the Commonwealth Court of Pennsylvania, but that appeal was eventually dismissed by Order of the Court dated May 17, 2007 for Claimant's failure to comply with Court Orders requiring the filing of a brief which conformed to the Pennsylvania Rules of Appellate Procedure.

During the pendency of that appellate procedure, Claimant filed a fourth Claim Petition on or about July 19, 2006 alleging the same exposure to the same chemical on the same date. That Petition was dismissed by Workers' Compensation Judge David Torrey by Decision dated August 21, 2006 after Motion and Rule to Show Cause. Judge Torrey dismissed on the grounds of *res judicata* but also held that, to the extent that the claim by Petitioner at this time might be deemed to be alleging exposure to a different chemical or, in fact, a different variety of the same chemical, it was barred by the statute of limitations applicable to workers' compensation claims. (Section 315 Pennsylvania Workers' Compensation Act, 77 P.S. § 602). Even to the extent that a discovery rule would be applied to that statute of limitations in this regard, Claimant admitted in his pleadings and filings that the full and complete identity of the chemical to which he had been exposed back in 1996 was known to him at least as early as 2001. Thus, Judge Torrey again concluded that the Claim would be barred.

That Decision was appealed by Claimant to the Pennsylvania Workers' Compensation Appeal Board who affirmed Judge Torrey's Decision by Order dated May 23, 2007. No appeal was filed by Claimant from the Board's

Decision to the Commonwealth Court of Pennsylvania. Instead, responding to a civil lawsuit for abuse of process filed by the Employer against Claimant and his counsel in Common Pleas Court in Allegheny County, Claimant filed a document with the Pennsylvania Supreme Court seeking permission to appeal directly from the Appeal Board Decision to the Supreme Court. By letter dated June 12, 2007, the Pennsylvania Supreme Court Prothonotary returned that document to Claimant refusing to docket it as being completely outside of all known and accepted procedure before that Court.

Finally, Claimant filed a fifth Claim Petition alleging the same exposure on the same date in 1996, which was assigned to Workers' Compensation Judge Oliver and dismissed by him under date of January 30, 2007, again after Motion and Rule. The Pennsylvania Workers' Compensation Appeal Board again affirmed that dismissal by Order dated September 18, 2007, and at that point, Claimant filed a document which resulted in the Supreme Court ruling which Claimant alleges as the basis for his Petition for Writ of Certiorari to your Honorable Court. Claimant filed an Application for Extraordinary Relief under Pennsylvania Rule of Appellate Procedure 3309 seeking to invoke the Court's King's Bench Powers dealing with review of matters of overriding public importance that might otherwise escape review. That application was eventually denied by Per Curium Order dated June 25, 2008. Claimant has since withdrawn a Petition for Reconsideration filed with the Pennsylvania Supreme Court from that denial and now seeks review by your Honorable Court under a Writ of Certiorari.

ARGUMENT

Respondent respectfully submits that it takes nothing more than a brief review of the procedural history (tortured as that is) of this case in the Pennsylvania Workers' Compensation system to understand that nothing has occurred here that would warrant review by the United States Supreme Court under Rule 10. Surely, the most recent action by the Supreme Court of Pennsylvania, refusing King's Bench review of this matter has not decided any Federal question at all. Nor has it decided a question that conflicts with any other State Court of last record, nor of this or any other Federal Court. Instead, the Supreme Court of Pennsylvania has merely exercised its appropriate discretion under its own rules and 42 Pa. C.S.A. § 726, not to invoke King's Bench authority to further review what has gone on in this case.

Claimant here has filed five Claim Petitions, all of which have been denied or dismissed. Claimant has had multiple Appeals to the Workers' Compensation Appeal Board and has lost on each occasion. Claimant has twice been to the Commonwealth Court of Pennsylvania which held the underlying factual basis for Claimant's continuing pursuit of this case insufficient under Pennsylvania law. The Pennsylvania Supreme Court has on multiple occasions refused to hear this matter further. And this Court has previously denied a Writ of Certiorari. It is not at all clear how Claimant could urge or represent to this Court that he has not had benefit of due process of law. Losing does not represent a lack of due process.

Claimant now compounds the inappropriateness of his conduct in this matter by misrepresenting to this Honorable Court the time limits applicable to his action under Pennsylvania Workers' Compensation law. Claimant has represented to this Court that a 500 week time limit applies to this matter. It does not.

Under Pennsylvania law a workers' compensation claimant may receive up to 500 weeks of partial disability. Pa. W.C. Act § 306(b), 77 P.S. § 431. The Act further provides that a W.C.J. may review an award, a Notice of Compensation Payable, or a Supplemental Agreement for any mistake of fact or for certain changes of disability status "at any time." Pa. W.C. Act § 413(a), 77 P.S. §§ 771-774. In interpreting the interface between these two sections, our appellate courts have applied the 500 week period in § 306(b) as a limiting factor on the "at any time" phrase in § 413(a).[1] All circumstances where the 500 week limit is applicable involve, however, cases where liability for benefits under the Act was mutually agreed upon or awarded after litigation. It absolutely does not apply to cases where no liability for benefits has previously attached.

Pennsylvania law is quite clear with regard to such cases where liability has not yet attached that the 3 year statute of limitations in Section 315 of the Act (77 P.S. § 602) applies. It has been interpreted as a statute of repose. Bellefonte Area School District v. W.C.A.B., 627 A.2d 250 (Pa. Cmwlth. 1993), aff'd 680 A.2d 823 (Pa. 1994). As such, its passage extinguishes all rights under the Act. Judge Torrey in his Decision back in August of 2006 so held. The Workers' Compensation Appeal Board affirmed Judge Torrey's Decision. No further appeal from that was ever taken. Accordingly, Judge Torrey's ruling that Claimant is outside the statute of limitations for filing any new workers' compensation claim in Pennsylvania is now final, unappealed, and *res judicata*.

Claimant in this matter has filed multiple Petitions for the same claim. He lost initially on the grounds that he was not disabled from the exposure that he received nor did he

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[1] Chiefly, this applies in cases of suspension of benefits in the presence of ongoing disability but no loss of earnings or attempts to reinstate total disability benefits after receipt of 500 weeks of partial disability benefits. See, Stewart v. W.C.A.B., 756 A.2d 655 (Pa. 2000) and Stehr v. W.C.A.B., 936 A.2d 570 (Pa. Cmwlth. 2007).

suffer any medical expense as a result. That determination by Workers' Compensation Judge Vallely back in 1997 and 1998, has long since been final. Claimant's multiple attempts to reopen that with new Petitions of varying kinds have been uniformly and universally dismissed under the doctrine of *res judicata*.

References in the Petition for Writ to estoppel, alleged misconduct by the Employer in 1996, alleged after discovered (in 2001) evidence, Hazardous Substance Regulations, equity, Right to Know Laws and errors of law or fact committed in 1996 are all irrelevant to this case. Claimant lost in 1996. That loss is long since final. Claimant failed to file any timely or meaningful Petition pursuant to the proper procedural mechanism for presenting after-discovered evidence (§ 426 of the Pa. W.C. Act) concerning the consequences he now says flowed from his discovery of the "Chemrex MSDS" in 2001. According to the 2003 Decision of the Commonwealth Court of Pennsylvania, he is now time barred from pursuing that remedy. And finally, Claimant is time barred under the applicable statute of limitations from bringing any new petition for a 1996 injury.

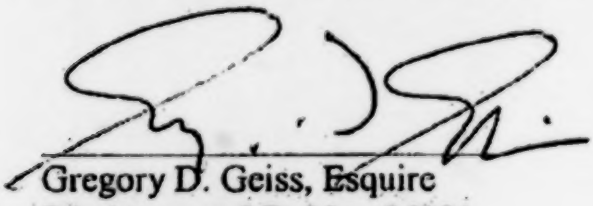
It can readily been seen that this Claimant has no further recourse to legal action in the Pennsylvania Workers' Compensation system on account of any alleged exposure in February of 1996 to anything. That he continues to pursue it is unfortunate. That he is represented by counsel in his repeated attempts and patent abuse of process is disturbing. Nevertheless, those matters are not before this Court. It can, however, readily been seen that no important Federal question, no matter of Constitutional import, and no conflict with any other State Court of last resort on any such issue is presented in this matter. It is purely a state matter and, as such, should receive no review by this Court.

CONCLUSION

For the reasons stated heretofore, Respondent respectfully submits that this Writ for Certiorari has been improvidently filed with Your Court and should be denied.

Respectfully submitted,

FARRELL & FRATICELLI, P.C.

By: 

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